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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

NUTRACEUTICAL CORPORATION and)	
SOLARAY, INC.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 2:04CV00409 PGC
)	
ANDREW VON ESCHENBACH, M.D.,)	
Commissioner, U.S. Food and Drug)	
Administration, <u>et al.</u> ,)	
)	
Defendants.)	

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

The above-named Defendants move for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing Causes of Action III and IV of Plaintiffs' complaint with prejudice. Defendants seek summary judgment on Plaintiffs' Cause of Action III on the

ground that the Food and Drug Administration (“FDA”), in promulgating the Final Rule Declaring Dietary Supplements Containing Ephedrine Alkaloids Adulterated Because They Present an Unreasonable Risk, 69 Fed. Reg. 6788 (Feb. 11, 2004) (“Final Rule”), acted on a rational basis, in accordance with the Administrative Procedure Act and the Federal Food, Drug, and Cosmetic Act, in excluding non-dietary supplement products from the Final Rule.

Defendants seek summary judgment on Plaintiffs’ Cause of Action IV on the grounds that FDA followed the required rulemaking procedures when promulgating the Final Rule, and that the risk-benefit analysis used to determine unreasonable risk in the Final Rule did not require a separate notice-and-comment rulemaking because it is not a substantive rule.

This motion is accompanied by a memorandum of law setting forth in detail the basis for Defendants’ motion.

DATED this 18th day of January, 2007.

Respectfully submitted,

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Dated: January 18, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2007, I electronically filed a true and correct copy of "DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT" with the Clerk of the Court using the CM/ECF system which sent notification of filing to the following:

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